United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/ affidavit

75-4261

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4261

ANTOINE THUREL,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.

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and opinion of the Attorney General or that of his duly authorized delegate.* Huskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969); United States ex rel. Polenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, the Circuit has determined that only where there is a clear probability of persecution to the particular alien is the discretionary authority to be favorably exercised. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). See also Dypolito v. Immigration and Naturalization Service, 382 F.2d 98 (7th Cir. 1967), Lena v. Immigration and Naturalization Service, 379 F.2d 536 (7th Cir. 1967).

* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1(d)(1).

B. The evidence before the Attorney General failed to establish a clear probability of political persecution.

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule; that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that he would be subject to persecution. MacCaud v. Immigration and Naturalization Service, 500 F.2d 355 (2d Cir. 1974).

Thurel's contention that he would be subject to persecution should he return to Haiti is based on the allegation that he had been associated during the period of 1956 until 1963 with political figures whose associates were persecuted by the

Haitian government then in power. To support this, Thurel testified that he had been "active" in the 1957 election which brought Duvalier to power. Subsequent to that election, he participated in a secret group which passed out leaflets opposing the Duvalier government. Nonetheless, he testified that he had never been arrested or questioned by the police.

Thurel also bases his request for political asylum in part on fear of action that will be taken against him because of his association with Josue Jean Baptiste, his second cousin. Mr. Baptiste testified that he had been elected to parliament in 1957. He had been "known" to be "against Duvalier", had left Haiti around 1961, returned briefly in 1963 and now resides in New York City. He apparently left Haiti without incident after his brief visit in 1963.

In rendering his decision the Immigration Judge stressed the dearth of credible evidence to support the petition. The Immigration Judge pointed out that Thurel had not been subjected to any mistreatment whatsoever during the sixteen or eighteen years he lived in Haiti subsequent to the events he described. The Immigration Judge also noted the brief presence of Baptiste in Haiti in 1963.

It is respectfully submitted that the decision of the Immigration Judge affirmed by the Board of Immigration Appeals is supported by the record in these proceedings. The record reflects that Thurel or his family have never been harmed as a result of his alleged political activities or associations. His claim that he fears politically motivated reprisals for his associations twenty years ago does not appear credible in the light of the long period of time subsequent to the activities during which he lived in Haiti without incident. Nor does the fact of Baptiste's remaining in Haiti until 1961 (four years after the election) seem consistent with their claim that association with him by Thurel would put the petitioner in danger.

The fact remains that Thurel, despite his alleged political activities remained in Haiti without harm for many years to himself or his family. He was able to obtain travel documents from his homeland in order to visit the United States. Nothing in the record of proceedings indicates that Thurel is on a proscribed list, or was required to flee from Haiti. Compare Paul v. Immigration and Naturalization Service, supra. Instead, the record of proceedings in this case indicates that Thurel has merely overstayed his non-immigrant visitation and now seeks to circumvent normal immigration procedures by the utilization of the

provisions of Section 243(h) of the Act. It is respectfully submitted that the petitioner has failed to substantiate his self-serving and conjectural testimony with any credible evidence indicating that there exists a clear probability of persecution in this case. It is therefore submitted that the Board of Immigration Appeals correctly affirmed the findings of the Immigration Judge.

C. The Immigration Judge did not err in admitting into evidence the advisory opinions obtained from the Department of State.

The petitioner contends that the State Department's advisory opinion has not evidentiary value and should be removed from the record. It is noted that the petitioner did not object to the introduction of this document at the deportation hearing below (T. 7, p. 7). Furthermore, the Immigration Judge specifically noted that he did not intend to be guided by the conclusions contained therein except insofar as he might reach the same conclusion from evidence introduced at the hearing itself.

With respect to the introduction of that advisory opinion at the deportation hearing where Thurel's claim was considered "de novo", it is submitted that the Department of State's opinion "came from a knowledgeable and competent source" and were therefore admissible at the hearing. Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1969). See also 8 C.F.R. § 242.14(c). Such letters have been held

admissible, Paul v. Immigration and Naturalization Service, supra, at p. 199; Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir. 1969); Sheng v. Immigration and Naturalization Service, 400 F.2d 678 (9th Cir. 1968), cert. denied, 393 U.S. 1054 (1969); c.f. Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955), even though their quality may be questioned. Hosseinmardi, supra. The letter was certainly of probative value and the fact that the Immigration Judge's findings coincide with the opinion of the Department of State appears to be the result of the petitioner's own failure to supply any credible or substantiated evidence in rebuttal to its conclusions. Finally it is noted that the Immigration Judge was not guided by the conclusions of the Department of State but rather reached his own independent conclusion based by the evidence introduced at the hearing.

The Immigration Judge enjoyed the advantage of seeing and hearing the petitioner and his cousin, and was in the best position to determine the accuracy, reliability and truthfulness of the testimony. His evaluation thereof is entitled to great weight. Kokkinis v. District Director, 429 F.2d 938 (2d Cir. 1970); Sigurdson v. Landon, 215 F.2d 791, 796 (9th Cir. 1954).

The deportation hearing complied with all the requirements of a fair hearing. Sung v. McGrath, 339 U.S. 33 (1950). The petitioner was represented by counsel and was given the opportunity to be heard and to introduce evidence and credible witnesses on his behalf. 8 C.F.R. § 242.16. Absent any arbitrariness or abuse of discretion the decision of the Immigration Judge should be permitted to stand. If the petitioner's persecution claim was rejected twice in opinions of the Department of State, and again by the Immigration Judge when his contentions were heard de novo, it was not as a result of error on the part of the Immigration Judge but rather because the claim is frivolous.

CONCLUSION

THE PETITION FOR REVIEW SHOULD BE DISMISSED.

Dated: New York, New York

March 15, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for the Respondent.

THOMAS H. BELOTE,
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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 75-4261

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 15th day of March, 19 76 she served 2 copys of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Claude Henry Kleefield, Esq.,
Suite 400,
100 West 72nd St.
New York, NY 10023

And deponent further says she sealed the said envelope and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

15th day of March, 19 76

Ralph L. Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977